



## Proposed Regulation Agency Background Document

<b>Agency name</b>	DEPT OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation</b>	12 VAC 30 -120-70 through 30-120-120 REPEALED 12 VAC 30-120-1700 et seq.
<b>Regulation title</b>	Waiver Programs
<b>Action title</b>	Technology Assisted Waiver
<b>Date this document prepared</b>	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.*

The Department of Medical Assistance Services is repealing the existing Technology Assisted Waiver regulations (12 VAC 30-120-70 through 12 VAC 30-120-120) and promulgating new regulations (at 12VAC 30-120-1700 *et seq.*) in response to changes in the affected industry and to achieve greater consistency and clarity in content and format with the other DMAS' waiver programs. These waiver program regulations have not been substantially revised since 2000.

The following changes are addressed in this proposed stage action: i) definitions have been expanded and modified; ii) waiver participant eligibility requirements are being updated for clarification of institutional deeming rules and for consistency and clarity in the use of a Uniform Assessment Instrument for eligibility determination. The deeming rules are applied as if the participant resided in an institution and would require that level of care; iii) provider participation standards and staff qualifications are being updated consistent with current industry standards; iv) the use of the Uniform Assessment Instrument and screening guidelines for anyone requesting waiver screening are being incorporated; v) clarification of the DMAS provision of direct waiver oversight for this waiver and authorization of services; vi) update and clarification of all waiver services and provider service delivery standards to the current industry standards;

vii) inclusion and expansion on waiver participant rights and responsibilities, and; viii) update to current industry practices for the waiver individuals' right to file grievances or exercise their appeal rights.

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

DMAS' Technology Assisted Waiver operates under the authority of §1915 (c) of the *Social Security Act* and 42 CFR §§ 435.211, 435.17, and 435.230 which permit the waiver of certain State Plan requirements (such as comparability of services and sufficiency of the amount, duration, and scope of services). These cited federal statutory and regulatory provisions permit the establishment of Medicaid waivers to afford the states with greater flexibility to devise different approaches, as alternatives to institutionalization, in the provision of long term care services. This waiver authority permits DMAS to target specific services to eligible individuals on the basis of their diagnoses.

This particular waiver provides Medicaid individuals, who require complex medical care and substantial and ongoing skilled nursing care, with numerous supportive services thereby enabling them to remain in their homes and communities at lower costs, as opposed to being institutionalized in nursing facilities or long stay hospitals. Pursuant to federal statute, the costs of these services in the community are prohibited from costing, in the aggregate for this federally authorized waiver, more than the comparable institutional costs.

## Purpose

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

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The waiver originally became effective in 1988 primarily for ventilator dependant children and was approved by CMS and funded by the General Assembly. In 1997, CMS approved the

addition of adults to this waiver. The impetus for the inclusion of adults derived largely from the fact that children, who had been cared for for years through this waiver, were becoming too old for the waiver services and had no alternative other than institutional care for their required medical care. These regulatory changes are needed to assure that the ongoing changes in medical technology and industry practices continue to support the health, safety, and welfare of this waiver population. DMAS anticipates that these modifications and updates will allow for provider agencies and their staff and the waiver individuals, while complying with applicable federal requirements, to continue to participate in this important and vital waiver program.

The Technology Assisted Waiver is responsible for and provides direct care coordination currently for 315 individuals who require complicated healthcare because they are chronically ill or severely impaired and dependent on sophisticated technology to sustain their lives. This population includes 228 (73%) children and 87 (27%) adults. Of the pediatric population, 196 or (85%) require a tracheostomy to sustain life and of this 196, 86 or (37%) are also ventilator dependant. Of the adult population, 68 or (78%) require a ventilator to sustain life. Some of the common diagnoses found for this waiver population are Amyotrophic Lateral Sclerosis (ALS), Respiratory Failure, and Cerebral Palsy.

### Substance

*Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)*

The state regulations that are affected by this action are the Technology Assisted Waiver regulations located at 12 VAC30-120- 70 through 12 VAC30-120-120 which are being repealed. New regulations are being promulgated at 12 VAC 30-120-1700 et seq.

All of DMAS waiver programs contained different definitions for the same or similar terms which caused unnecessary confusion among providers. The existing Technology Assisted Waiver regulations contain limited requirements for individual screenings and individual eligibility requirements in regard to preadmission screenings. There is a lack of clarification of the criteria for alternate institutional placement as it relates to the age of the individual seeking consideration for waiver enrollment.

The existing regulations contain the general requirements for providers of waiver services but do not include personal care aide qualifications, training or mandated provider oversight (i.e.: providers' responsibility for documentation and record maintenance, provision for criminal record and sex offender checks, restrictions from hiring persons convicted of barrier crimes and the assurance of dignity and quality of life for waiver individuals).

The current regulations do not include waiver individual's rights and responsibilities, a statement of participants' choice of providers of services or protection from abuse, neglect, exploitation or misappropriation of property. The current regulations also do not include current standards of practice for the plan of care and skilled private duty nursing services.

Currently, these regulations require the use of the DMAS-225 (previously DMAS 122) form by the local departments of social services to communicate to long term care providers relevant information about individuals' eligibility. Providers are also able to access the electronic Automated Response System (ARS) and MediCall to obtain information about waiver individuals' eligibility periods, patient pay responsibilities, and whether they have full or limited Medicaid coverage.

In addition to proposing a new uniform format (across all waiver programs) for these regulations, changes will be proposed as follows: (i) definitions will be updated to include current industry standards; (ii) preadmission screenings will be updated to require the use of the same assessment tool (the Uniform Assessment Instrument) for all individuals seeking waiver services regardless of age; (iii) age specific assessment tools are incorporated into the revised regulations and serve as a guideline for determination of the number of skilled private duty nursing hours which can be authorized for waiver individuals; (iv) specialized care criteria are updated for final determination of waiver criteria; (v) clarification is provided for congregate private duty nursing; (vi) clarification is provided for the federal limitation of no more than 16 hours of skilled private duty nursing services in a 24-hour period of time and the make-up of missed nursing shifts; (vii) the inclusion of transition services under Money Follows the Person (MFP) is provided; (viii) nursing supervisory assessment visits are clarified; (ix) the plan of care is expanded to include required information elements, signatures, and timeframes; (x) annual eligibility re-determination and quality management reviews are provided for; (xi) individuals' rights and responsibilities are included; (xii) protection of individuals from abuse, neglect, exploitation, or misappropriation of property is included; (xiii) providers' responsibilities for documentation and record maintenance; (xiv) provision is made for criminal record and sex offender checks; (xv) limitations are provided on providers' hiring of persons who have been convicted of barrier crimes; (xvi) the assurance of dignity and quality of life for waiver individuals, and; (xvii) update for the appeal for denial of coverage rights for waiver individuals.

DMAS is also proposing changes consistent with mandates in Chapter 874 of the *2010 Acts of Assembly* Item 297 WW, and YYY and Chapter 785 as follows: (i) subsection WW requires the reduction of covered respite hours from 720 to 240; (ii) subsection YYY requires the reduction of the maximum coverage amount for assistive technology and environment modification services from \$5,000 to \$3,000, and; (iii) termination of provider agreements in instances where the provider has pled guilty to felony charges. The changes mandated by WW and YYY are affected by action of Congress to extend the Commonwealth's Federal Medical Assistance Percentage (FMAP) (the federal matching portion of DMAS' budget) under the American Recovery and Reinvestment Act (P.L. 111-5). If Congress extends DMAS' FMAP rate, then the changes in WW will not be enacted and changes in YYY will only take effect in the second year of the budget.

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*  
1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*

- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

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The advantages to waiver individuals of these changes are the provision of assistance with transitioning out of skilled nursing facilities or long stay hospitals into community care arrangements. The advantage to providers will be the updating of program requirements that are more up to date (than have previously existed for this program) as compared to current industry standards. These regulations are also being formatted consistently with other waiver programs to assist providers who participate in more than one waiver. These regulations also propose more uniformity, to aid providers, to the Definitions than have been previously used in Medicaid's several waiver programs.

The advantage to the agency will be the clarification of provider requirements which are expected to reduce exceptions encountered during provider reviews. Such exceptions can result in DMAS recovering expenditures which for small providers can represent substantial sums of monies to be returned to the program. These recoveries also often result in lengthy and costly provider appeal actions.

Improved efficiencies in this waiver program will reduce administrative expenditures which is more cost effective for the citizens of the Commonwealth. There are no disadvantages to citizens or the Commonwealth in these proposed changes.

**Requirements more restrictive than federal**

*Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

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These proposed regulations do not contain any requirements more restrictive than applicable federal requirements but do conform to the federally approved Medicaid waiver.

**Localities particularly affected**

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

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There are no localities that are uniquely affected by these regulations as they apply statewide.

**Public participation**

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

The agency is seeking comments on the intended regulatory action, including but not limited to (1) ideas to assist in the development of a proposal, (2) the costs and benefits of the alternatives stated in this background document or other alternatives and (3) potential impacts of the regulation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, record keeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to **Yvonne Goodman, 600 East Broad Street, Richmond, Va. 23219, office 804-786-0503, Fax 804-371-4986, email [yvonne.goodman@dmas.virginia.gov](mailto:yvonne.goodman@dmas.virginia.gov)**. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

A public hearing will not be held.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.</b></p>	<p>There is no increase in the cost to the Commonwealth associated with the update of these regulations.</p>
<p><b>Projected cost of the <i>new regulations or changes to existing regulations</i> on localities.</b></p>	<p>These regulatory updates do not have a unique effect on small business. These regulations establish services covered under this waiver program and the agency’s limits on those covered services. These regulations establish standards that providers must meet in order for their billing claims to be paid by DMAS. These regulations do not create any new deadlines or reporting requirements than are currently in existence for all providers of Medicaid services. There is no increase in the cost to the localities associated with the update of these regulations.</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations</i>.</b></p>	<p>Businesses likely to be affected by the proposed regulations include personal care</p>

	<p>providers who also provide skilled private duty nursing services. These providers may choose to use personal care hours when skilled nursing is not available due to a shortage of nursing staff.</p>
<p><b>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>The Preadmission screening teams will continue to screen for the adult population and also the minor population for waiver eligibility. DMAS works directly with the screening teams and the providers to assure a smooth transition from acute care hospitalization to community living. DMAS provides oversight of this waiver. Personal care agencies which include skilled private duty nursing services will continue to provide the skilled nursing and personal care staff for this waiver. There are approximately 52 such agencies throughout the Commonwealth. There are approximately 200 screening teams throughout the Commonwealth.</p>
<p><b>All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>There is no increase in the cost to the localities or providers associated with the update of these regulations.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>This regulatory update will offer providers the advantage of clarification of provider requirements which are expected to reduce exceptions encountered during provider reviews. Such exceptions can result in DMAS recovering expenditures which for small providers can represent substantial sums of monies to return to the program. These recoveries often result in lengthy and costly provider appeal actions. Improved efficiencies in the waiver program will provide for administrative expenditure reductions which is a more cost effective opportunity.</p>

## Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

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The agency has met with interested member advocates and providers (list attached) over the last six months to discuss this proposed regulatory action and viable alternatives have been considered. These suggested revisions represent the consensus of the agency's advisory group.

## Regulatory flexibility analysis

*Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

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These regulations do not have a unique effect on small business. These regulations establish services covered under this waiver program and the agency's limits on those covered services. These regulations establish standards that providers must meet in order for their billing claims to be paid by DMAS. These regulations do not create any new deadlines or reporting requirements than are currently in existence for all providers of Medicaid services.

## Public comment

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

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DMAS' Notice of Intended Regulatory Action was published in the September 14, 2009, *Virginia Register* (VR 26:1) for its public comment period from September 14, 2009 to October 14, 2009. No comments were received.

## Family impact

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and*

one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income depending upon which provider the individual chooses for the item or service prescribed.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change, rationale, and consequences</b>
12VAC30-120-70 th 120		Sets out all of the regulatory requirements for the Technology Assisted Waiver.	Old waiver regulations are being repealed as part of the agency's action to bring more consistency and uniformity to its multiple waiver programs. The same waiver regulatory format is being adopted across all waiver programs.
12VAC30-120-1700	Definitions.	Sets out all of the regulatory definitions for the Technology Assisted Waiver.	Old definitions are being expanded to allow for updates which include current industry standards, standards of practice and laws.
12VAC30-120-1705	Waiver description and legal authority	New provision over previous old regulations.	Sets out the federal statutory authority for this waiver as well as federal limitations.
12VAC30-120-1710	Individual eligibility requirements; Preadmission	Comparable to the parallel existing 12VAC30-120-80 B and C	Sets out the federal statutory cite for this waiver as well as use of the same assessment tools (the Uniform Assessment Instrument) for all

	screening		individuals seeking waiver services regardless of age and includes all updates for specialized care criteria. Establishes consistency across all waivers for preadmission screening requirements. Annual eligibility-re-determination and waiver individual's rights and responsibilities are updated.
12VAC30-120-1720	Covered services; limits; changes to or termination of services	Comparable to the parallel existing 12VAC30-120-90 A, B and C	Sets out the federal statutory cite for this waiver as well as the clarification of the federal limitations in regards to waiver services, skilled private duty nursing hours and termination from the waiver itself. Reductions in several specific services (covered respite hours, AT and EM) are resulting from the 2010 Appropriations Act are also proposed.
12VAC30-20-1730	General requirements for participating providers.	Comparable to the parallel existing 12VAC30-120-100	Sets out the general requirements for providers including checking for the commission of barrier crimes and mandated criminal record checks. Inclusion of mandated reporting for suspected abuse, neglect, exploitation or misappropriation of property. Inclusion of standard freedom of choice provisions, requirement to use person-centered planning, guarantee of provision of civil rights, etc. The federally mandated checks of persons and entities appearing on the List of Excluded Individuals and Entities has been added.
12VAC30-120-1740	Participation standards for provision of services.	Comparable to the parallel existing 12VAC30-120-110 A,B and C	Clarifies all required assessments and the development of the Plan of Care.

12VAC30-120-1750	Payment for services.	Comparable to the parallel existing 12VAC30-120-100 A, B and D.	Sets out required limits for the payment for these services.
12VAC30-120-1760	Utilization review; level of care reviews.	Comparable to the parallel existing 12VAC30-120-15 B.	Old regulations are being updated to include Quality Management Reviews.
12VAC30-	Appeals.	Comparable to the parallel	Update for the appeal of denied

120-1780		existing 12VAC30-120-120 A and B.	coverage rights for waiver individuals.

Composition of External Advisory Group for DMAS for Technology Assisted Waiver

Dee Dee George	Maxim Health Care
Janice Crews	The Pediatric Connection
Laurel Conneely	The Pediatric Connection
Marcie Tetterton	Virginia Association for Home Care and Hospice
Nancy Tobin	Pediatric Services of America
Paul Hamilton	Interim Health Care
Tracy Harrison	Carillion Home Care

DMAS:

Roberta Matthews  
Vivian Horn  
Steve Ankiel  
Suzanne Gore